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Thomas H.S. Curd  
*Eight Judicial Circuit*

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# SUBSTANCE AND PROCEDURE IN RULE MAKING\*

THOMAS H. S. CURD\*\*

WITH the impetus given to rule-making by the courts<sup>1</sup> since the inauguration of such a system in 1934 by Congress for federal courts,<sup>2</sup> the importance of the disputed distinction between substantive and procedural law takes on new significance. The question of the distinction, if any, has arisen in part in connection with the matters of (a) the merely academic classification of the law, (b) the subject of conflict of laws where there is a difference on a particular question between the *lex fori* and the *lex loci*, and (c) rule-making by the courts.

As late as 1941 a very distinguished scholar and law writer stated that the distinction was clear and that there was no twilight zone.<sup>3</sup> However, he was discussing the subject mainly in relation to the mere classification of the law and to the subject of conflict of laws. Many are the views that have been expressed on the question. There is a plethora of literature by eminent teachers. Austin said the distinction between substance and procedure "cannot be made the basis of a just division."<sup>4</sup> The terms "adjective" and "substantive" were invented by Bentham.<sup>5</sup> Holland assumed there was a difference and in general terms defined each.<sup>6</sup> Although Salmond recognized the distinction, he seems to have been the first to recognize the twilight zone and pointed out that there are many procedural rules which in their operation are "substantively equivalent" to rules of substantive law.<sup>7</sup> Chamberlayne takes the view that there is no distinction<sup>8</sup> while Cook admits there is a distinction but invents the "twilight zone".<sup>9</sup> This view seems to be the most widely accep-

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\* This paper was prepared as a report of a subcommittee of the West Virginia Judicial Council and presented to the council at its meeting on October 23, 1946.

\*\* Judge of the Eighth Judicial Circuit, Welch, West Virginia.

<sup>1</sup> Cf. *Judicial Rule-Making Power Gains Ground* (1943) 27 J. AM. JUD. SOC. 59.

<sup>2</sup> 48 STAT. 1064 (1934), 28 U. S. C. § 723 (1934).

<sup>3</sup> See Kocourek, *Substance and Procedure* (1941) 10 FORDHAM L. REV. 172.

<sup>4</sup> 2 AUSTIN, LECTURES ON JURISPRUDENCE (4th ed. 1879) 611.

<sup>5</sup> Kocourek, *supra* note 3, at 157.

<sup>6</sup> HOLLAND, JURISPRUDENCE (11th ed. 1910) 89.

<sup>7</sup> SALMOND, JURISPRUDENCE (7th ed. 1924) § 172.

<sup>8</sup> 1 CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE (1911) § 171.

<sup>9</sup> Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333.

ted. Chamberlayne claimed the distinction was of little importance and is based on difference in form of statement; that the distinction is "illusory and artificial".<sup>10</sup> Cook says he cannot agree unless he adds "for the purpose at hand."<sup>11</sup> But he says, "For other purposes it may become vital and important."<sup>12</sup> The real importance in West Virginia of whether there is a distinction, what it is, and whether there is a twilight zone, arises from the statutes passed in 1935<sup>13</sup> and in 1945,<sup>14</sup> giving the supreme court of this state power to

"From time to time make and promulgate general rules and regulations governing pleading, practice and procedure in such court (Supreme) and in all other courts of record in this state. All statutes relating to pleading, practice, and procedure shall have force and effect only as rules of the court and shall remain in effect unless and until modified, suspended, or annulled by rules promulgated pursuant to the provisions of this section.

"When and as the rules of the court herein authorized shall be prescribed, adopted and promulgated, all laws and parts of laws that conflict therewith shall be and become of no further force or effect, to the extent of such conflict."

A number of the states have almost the same provisions as we regarding the rule-making power of their respective courts. Other states have rule-making authority but it is not so broad. Sometimes the authority is given by the constitution of the state. In nearly all states the courts have always assumed the authority on a small scale in merely minor matters dealing largely with the administration of the court.<sup>15</sup> In Michigan, the Constitution of 1850 authorized procedural rules of court but, strangely enough, all later changes in procedure were made by the legislature.<sup>16</sup> The courts everywhere have been reluctant to assume the role of rule-makers wherever a conflict with substantive law might occur. Congress in 1934 authorized the Supreme Court of the United States to promulgate rules of civil procedure but specifically provided against encroachment on

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<sup>10</sup> CHAMBERLAYNE, *loc. cit.*, *supra* note 8.

<sup>11</sup> Cook, *supra* note 9, at 337.

<sup>12</sup> *Ibid.*

<sup>13</sup> W. Va. Acts 1935, c. 37; W. VA. CODE (Michie, 1943) § 5183.

<sup>14</sup> W. Va. Acts 1945, c. 44; W. VA. CODE (Michie, Supp. 1945) § 5183

(1).

<sup>15</sup> Harris, *The Extent and Use of Rule Making Authority* (1938) 22 J. AM. JUD. SOC. 27, analyzes and classifies the rule-making power in the several states.

<sup>16</sup> *Id.* at 28.

the substantive rights of any litigant<sup>17</sup> and, to make doubly sure that substantive rights might not be encroached on by the Court, provided that the rules should not take effect until Congress had an opportunity to approve or disapprove them. They were submitted to Congress, no change was made, and they went into effect in 1938.<sup>18</sup>

As pointed out in 1926, the power of the courts among the various states at that time to make rules fell into three classes: (1) full and complete power granted either by constitution or statute; (2) power given not expressly limited to rules "consistent with law and statute" but with the courts conforming to that view nevertheless; (3) power subject to an express limitation granting the courts power to make rules "not inconsistent with statute or law."<sup>19</sup>

A complete check has not been made but the following states would seem currently to fall in class 1: Alabama, Arizona, Colorado, Connecticut, Delaware, Iowa, Maryland, Michigan, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin. There may be others as none of the authorities consulted was of later date than 1942. At that time many other states were working on the subject of rules and may be in class 1 by this time. Some of those listed are required to file the rules with the legislature.

Within the past twenty years, and especially since the congressional legislation, the bar and the bench have been rule-conscious and the tendency is decidedly toward depending more on the court for rules than on legislative enactment. In other words, the idea is rapidly becoming popular. But many doubts and questions arise, *viz.*: What is substantive law and what is procedural law? Is there always a clear distinction? Is there a twilight zone? Where must the court stop in its rule-making power? Is there a clear definition of substantive law and another of procedural law? Can a formula be provided by which courts may be guided in knowing where to stop, or must they be governed largely by expediency in making rules? In case of doubt or in all cases, should the rules be submitted to the legislature for approval?

It is the opinion of many that it should not and will not be the purpose of the Judicial Council of this state, or the supreme court,

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<sup>17</sup> 48 STAT. 1064 (1934), 28 U. S. C. 723 (1934) ("Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant").

<sup>18</sup> *Cf. Supreme Court Adopts Rules for Civil Procedure in Federal District Courts* (1928) 24 A. B. A. J. 97.

<sup>19</sup> Paul, *The Rule Making Power of Courts* (1926) 1 WASH. L. REV. 163.

to enter into a large-scale program of rule-making. Our present system of rules, they say, whether enacted by the legislature or promulgated by the courts, has been too satisfactory, too complete, and too fully responsive to all needs of the bar and of the public to give rise to a demand for any great changes. If any one in West Virginia is unduly delayed in defending himself or in enforcing a right under our present rules of procedure, it is not, generally speaking, because of fault in the rules. The fault is traceable to the bar for failing to observe the existing rules or to the court for failing to enforce them. But, as time passes and conditions change, it will, as heretofore, become desirable to make some changes in our procedure and it will have to be done either through the legislature, or, since the legislature has delegated the function to the supreme court, by that court. It therefore behooves the Judicial Council, under the authority given it by the legislature,<sup>20</sup> to make recommendations to the supreme court regarding desirable rule changes and to inform itself very thoroughly regarding the historical background of rule-making as well as and particularly regarding the matter of substantive and procedural law, the extent to which the court can go in making rules, and the limitations that may be imposed by statute, common law practice, the constitution, tradition, the bar, and public sentiment. The duty is incumbent upon the bar of this state to inform itself and to make its wishes known to the Judicial Council and to the supreme court.

In the consideration of this subject, we are met at the threshold with our state constitutional provisions regarding the divisions of our government into three departments, legislative, executive, and judicial.<sup>21</sup> It may be claimed, that, by our 1935 statute,<sup>22</sup> the legislature delegated legislative authority to the judiciary. This objection is met by adherents of the rule-making power of the courts with the proposition that: (a) it has always been the function of the courts from earliest times to make the rules governing the procedure of the courts; (b) rule-making, so far as it does not invade substantive rights but involves only procedural rights, has been a judicial function at all times, rather than a legislative one; (c) there is nothing in the Constitution of the United States which requires the state governments to keep entirely separate the three

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<sup>20</sup> W. VA. CODE (Michie, 1943) § 5707 (5).

<sup>21</sup> W. VA. CONST. art. V.

<sup>22</sup> *Supra* note 13.

departments of government and any two or more of these departments may be combined into one agency unless prohibited by the state constitution;<sup>23</sup> and (d) therefore, when the legislature delegated all rule-making in this state to the supreme court, we merely reverted to the original practice of the old days. In 1792, the Attorney General of the United States requested information from the United States Supreme Court concerning the rules and regulations of the Court. The Chief Justice, speaking for the Court and its members, replied that the court considered the practice of the courts of the King's Bench and Chancery in England as affording outlines for practice in this Court and that they will from time to time make such alterations therein as circumstances may render necessary.<sup>24</sup> At that time, pleading, practice, and procedure in England was largely and had been from the beginning of the English common law by rules of the courts.<sup>25</sup> But when our Federal Constitution incorporated provisions for the three branches of government, many of the states felt called upon to do the same. In England, the courts had grown up as a tradition; but in this country they were created in greater part by the legislative branch of the government. The legislatures had more prestige than the courts they created<sup>26</sup> and it was easier to pass a statute than to "await on the development of court procedure by court decision and tradition."<sup>27</sup> So rule-making was gradually taken over by the various legislatures with the acquiescence of the courts and, generally, the courts everywhere have been reluctant to exercise their inherent rule-making power. It is interesting to note, however, that in some instances the courts have not followed strictly these legislative enactments, notably in regard to contempt.<sup>28</sup>

Acquiescence by the courts in the taking over of the rule-making power by the legislatures does not imply that the courts have

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<sup>23</sup> *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908); *Claiborne County v. Brooks*, 111 U. S. 400 (1884); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908).

<sup>24</sup> 2 Dall. 411 (U. S. 1792).

<sup>25</sup> 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1926) 261.

<sup>26</sup> POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938) 38.

<sup>27</sup> Harris, *The Ruling Making Power in JUDICIAL ADMINISTRATION MONOGRAPHS*, Series A (Collected) (1942) 6.

<sup>28</sup> *Cf. Voorhis v. Childs' Ex'r*, 17 N. Y. 354 (1858); *Reubens v. Joel*, 13 N. Y. 488 (1856); *Booth v. Farmers & Mechanic' Nat. Bank*, 1 Thomps. & C. 45 (N. Y. Sup. Ct. 1873). The cases are collected in Paul, *supra* note 19.

abdicated to the legislatures the functions which have always been regarded as judicial. As pointed out, in a Washington case,

"Assuming the right of the Legislature to make rules for the court, and acknowledging its continued action in that respect, it does not follow that such action is a legislative function. Not all acts performed by a Legislature are strictly legislative in character. A failure to recognize this distinction often gives rise to the belief that one of our law-making bodies has abdicated its duty and attempted to transfer its legislative mantle to the shoulders of another body not legislative, thereby subverting the purpose of its laws which govern them enacted by their duly chosen representatives."<sup>29</sup>

Chief Justice Marshall once said:

"It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendant admit. The 17th section of the Judiciary Act, and the 7th section of the additional act, empower the Courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.

"The line has not been exactly drawn which separates these important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."<sup>30</sup>

To the same effect in the companion case of *Bank of the United v. Halstead*, Mr. Justice Thompson remarked:

"Congress might regulate the whole practice of the Courts if it was deemed expedient so to do; but this power is vested in the Courts; and it never has occurred to anyone that it was a delegation of legislative power."<sup>31</sup>

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<sup>29</sup> *State ex rel Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 5, 267 Pac. 770, 771 (1928).

<sup>30</sup> *Wayman v. Southard*, 10 Wheat. 1, 42 (U. S. 1825).

<sup>31</sup> 10 Wheat. 51, 61 (U. S. 1825).

State courts have used similar language, as in the statement by the Colorado supreme court that

"This court has always been of the opinion, we believe unanimously so, that the act of 1913 was not a delegation of legislative authority. The regulation of its own practice and procedure has always been a matter for the court except so far as the legislature has interfered. See 15 C. J. 901. The act of 1913 restored that power which other legislatures had partially taken away and gave the added power to make rules for lower courts just as other states have done, and as Congress gave the United States Supreme Court power to make rules in equity."<sup>32</sup>

An objection sometimes raised is that the legislature must legislate more in detail regarding pleading, practice and procedure, rather than in mere generalities, to effect a valid transfer of rule-making power to the courts. But numerous cases may be cited in which such authority has been upheld where only a broad general policy or pattern was expressed by the legislature and the working out of that pattern was left to the agency designated to effectuate it.<sup>33</sup>

Objection might be raised to provisions keeping present statutes in effect as rules until others are promulgated by the court in lieu thereof. This point has been passed on in *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*,<sup>34</sup> which quoted and followed the rule as stated in a standard legal encyclopedia in the following terms:

"Where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it shall operate only on the happening of some specified contingency. Such a statute lies dormant until put into active force by the existence of conditions on which it is intended to operate."<sup>35</sup>

As may be concluded from what has been said, there is little question as to the present-day tendency toward favoring the courts in making rules, even to the extent of encroaching on substantive law in the twilight zone, especially if the legislature is later to ratify

<sup>32</sup> *Ernst v. Lamb*, 73 Colo. 132, 133, 213 Pac. 994, 995 (1923).

<sup>33</sup> *Cf. Rinehart v. Woodford Flying Service*, 122 W. Va. 392, 9 S. E. (2d) 521 (1940); *Fahey v. Mallonee*, 67 S. Ct. 1552 (U. S. 1947); *Rohrer v. Milk Control Board*, 322 Pa. 257, 186 Atl. 336 (1936); *Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693 (1908); *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922); *State ex rel. Oregon R. R. & Nav. Co. v. Railroad Com'n*, 52 Wash. 17, 100 Pac. 179 (1909).

<sup>34</sup> *Supra* note 30.

<sup>35</sup> 12 C. J. 864 (1917).



the rules. There is little question as to what the supreme court in this state can do under its rule-making power as vested in it by the legislature. Unless it conflicts with a law on a question arising under the Constitution or laws of the United States<sup>36</sup> or some specific clause of the state constitution,<sup>37</sup> it will have the final decision. Our supreme court will determine all questions of a constitutional nature, of policy, of expediency, of what is substantive law and what is procedural law, what changes are desirable and what approbation such rules will receive from the bar and the public when these changes shall have been made, and so it is not a matter so much of what the court *can* do, but what it *should* do, with which we are concerned. It is a tribute to the court's integrity and the confidence of the legislature in our supreme court that such a wide latitude has been entrusted to it in the making of rules for its own procedure and that of inferior courts in the state. Such authority, for all the more reason, should be used by the court only where clearly needed to promote justice and for uniformity in procedure throughout the state.

It has already been observed that there is quite a contrariety of opinion on what is substantive and what procedural law, whether they can be clearly defined, whether there is a twilight zone, whether procedural law does not, indeed, very often include substantive law. For many years eminent scholars and teachers have debated the subject and notably Holland, Austin, Salmond, Cook, Chamberlayne, Kocourek, and Bentham. Preliminary to final action by the United States Supreme Court on Federal Rules of Civil Procedure, an advisory committee of distinguished teachers, lawyers, and judges<sup>38</sup> prepared them. American Bar Association Institutes on Federal Rules were held in various parts of the United States under the auspices of the American Bar Association and were attended by attorneys from all the states.<sup>39</sup> In the course of discussions, when the Institute was being held at Cleveland, it was conceded that some of the rules might be held invalid as violating substantive law.<sup>40</sup> And so it seems now to be very generally conceded that there is a

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<sup>36</sup> A rule of practice prescribed for the circuit courts by the state supreme court which conflicts with an act of Congress is void, *Suckley's Adm'r v. Rotchford*, 12 Gratt. 60 (Va. 1855).

<sup>37</sup> *Ex parte Doyle*, 62 W. Va. 280, 57 S. E. 824 (1907).

<sup>38</sup> The order of appointment, including the names of the distinguished personnel constituting the committee appears in 295 U. S. 774 (1935).

<sup>39</sup> See 63 A. B. A. REP. 697 (1938).

<sup>40</sup> AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE CLEVELAND INSTITUTE ON THE FEDERAL RULES (1938) 347.

twilight zone applicable for rule-making though possibly not so much as in the matter of interpretation of conflict of laws. For instance, statutes of limitations are regarded as remedial and therefore procedural in their nature, in the matter of conflict of laws.<sup>41</sup> So, also, as to proper parties to a suit where an assignment is involved, as to many presumptions, exemptions, homestead and otherwise, sets-off, counter-claims, many statutes involving evidence, the parol evidence rule, instances involving competency of witnesses, and even the measure of damages.<sup>42</sup> There is considerable controversy as to whether a law which shifts the burden of proof is substantive or procedural but it is generally regarded as substantive.<sup>43</sup>

*Sampson v. Channell*<sup>44</sup> clearly shows the difficulty under which courts labor where the question arises in dubious or twilight zone cases. No formula is possible and so they say the law is substantive for one purpose and procedural for another purpose.<sup>45</sup> As one editorial staff paraphrased the holding,

"A Federal court should, for the purpose of determining the incidence of the burden of proof as to contributory negligence in a negligence action, its jurisdiction over which is based on diversity of citizenship, regard the question as one of substantive law as to which it should follow the law of the state in which it sits, although by the law of such state the question is regarded as one of procedure as to which the state courts follow the law of the forum rather than the law of the state in which the cause of action arose."<sup>46</sup>

The accompanying annotation goes on to say that the classifications "substantive" and "procedural" were not due to any intrinsic character of the questions but were merely artificial and adopted to serve the purpose at hand "as indicated by the fact that courts have treated these questions as substantive for certain purposes and procedural for others."<sup>47</sup>

<sup>41</sup> *McElmoyle v. Cohen*, 13 Pet. 312 (U. S. 1839); *MINOR, CONFLICT OF LAWS* (1901) 522; *cf. RESTATEMENT, CONFLICT OF LAWS* (1934) §§ 603-605.

<sup>42</sup> See Kocourek, *Substance and Procedure* (1941) 10 *FORDHAM L. REV.* 157 cited *supra* notes 3 and 5; *cf. W. VA. CODE* (Michie, 1943) § 5725.

<sup>43</sup> *Pariso v. Towse*, 45 F. (2d) 962 (C. C. A. 2d, 1930).

<sup>44</sup> 110 F. (2d) 754 (C. C. A. 1st, 1940), *cert. denied*, *Channell v. Sampson*, 310 U. S. 651 (1940).

<sup>45</sup> *Id.* at 756 ("It is apparent, then, that burden of proof does not fall within either category of 'substance' or 'procedure' by virtue of any intrinsic compulsion, but the matter has been made to turn upon the purpose at hand to be served by the classification").

<sup>46</sup> 128 A. L. R. 394, syllabus (1940).

<sup>47</sup> *Id.* at 409.

Many of our statutes and laws which on their face would seem to be procedural would also seem clearly to involve substantive rights. We find many procedural statutes that appear to have rights in the procedure itself or expressions of policy of the legislation involved. If the statute or law gives a right or a privilege which on its face may be a benefit to one person over another, or takes away an advantage that may affect one over another in a suit, nevertheless, although the statute may primarily involve procedure there may be a substantive right involved. In many of these twilight zone cases the distinction or difference is always there, at times plainly in view. At other times, it is not so plain but indefinite, and still again, in such a small degree that it can be recognized only by intuition if at all, but the difference is still there. For instance, a question has been raised as to Rule 3<sup>48</sup> of the Federal Rules of Civil Procedure as to the use of the word "commenced". In West Virginia, of course, an action is commenced on the issuance of the process,<sup>49</sup> in some states when process is placed in the hands of an officer to serve it, in others when it is served on the defendant, and in still others when the complaint is filed. Rule 3 says it is commenced by filing the complaint with the court. The question is, does not Rule 3 affect substantive law in applying the statute of limitations?<sup>50</sup>

At the hearing on the Rules of Civil Procedure before the Senate Judiciary Committee considerable controversy arose over the question as to whether substantive law was involved in Rule 13 regarding counter-claims, in Rule 17 (a) regarding where corporations may be sued and whether a partnership may be sued in its trade name, and in Rule 37 regarding liability of an attorney in taking depositions. Rules 34, 35, and 37 were also questioned for similar reasons.

As noted earlier Kocourek said the distinction was improper. That was in 1941. However, in the Proceedings of the Institute in Cleveland in 1938, this statement was made:

"A great problem that the Advisory Committee had to deal with and which the members of the Bar will have to deal with is the distinction between substantive rights and procedural."<sup>51</sup>

<sup>48</sup> "A civil action is commenced by filing a complaint with the court."

<sup>49</sup> W. VA. CODE (Michie, 1943) § 5529; *Citizens' Nat. Bank v. Auvil*, 109 W. Va. 753, 156 S. E. 111 (1930).

<sup>50</sup> Cf. Note 4 to Rule 3, prepared by the Advisory Committee, in which this point is raised.

<sup>51</sup> AMERICAN BAR ASSOCIATION, *supra* note 40, at 182.

Merely as a matter for the record and ready reference, the following definitions, formulas, and comments regarding procedural and substantive law may be consulted.

According to Lorenzen, "... 'substance' includes all rules determining the legal relations which the courts will declare when all the facts have been made known to them, whereas 'procedure' relates to the process or machinery by which the facts are made known to the courts."<sup>52</sup>

Judge Magruder has said, "procedural rules are those which concern methods of presenting to a court the operative facts upon which the legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established."<sup>53</sup>

Chief Justice Marshall, in defining the words, "modes of process" in the Judiciary Act of 1789, said: "... the term is applicable to every step taken in a cause. It indicates the progressive course of the business from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding."<sup>54</sup>

The whole matter was extensively discussed, in 1938, at the Cleveland Institute on Federal Civil Procedure, in the following terms:<sup>55</sup>

"In the case of *Beers v. Haighton*, 9 Pet. 329, 9 L. Ed. 145 (1835), the decision in *Wayman v. Southard* was well summarized by Mr. Justice Story. He said (page 360), 'The power to alter and add to the process and modes of proceedings in a suit embrace the whole progress of such suit, and every transaction in it from its commencement to its determination and until the judgment should be satisfied and . . . it authorized the court to prescribe and regulate the conduct of the officer in the execution of the final process in giving effect to that judgment.'

"One case more, in *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506 (1882), Mr. Justice Miller said 'The term procedure is so broad in its significance that it is seldom employed in our books as a term of law. It included in its meaning whatever is embraced in the three technical terms—pleading, evidence, and practice.'

<sup>52</sup> Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311, 325. For a similar analysis, consult 3 BEALE, *CONFLICT OF LAWS* (1935) § 584.

<sup>53</sup> *Supra* note 44 at 755, n. 2.

<sup>54</sup> *Wayman v. Southard*, 10 Wheat. 1, 27 (U. S. 1825).

<sup>55</sup> *PROCEEDINGS*, *supra* note 40, at 304 ff.

"In *Poyser v. Minors*, 45 L. T. R. 33, 7 Q. B. D. 328 (1881), the question arose whether a rule of the county court as to the effect of a nonsuit was a rule 'for regulating the practice of the courts and forms of proceedings therein.' The validity of the rule was challenged on the ground that it attempted to declare substantive law, namely, the legal effect of the judgment of the court. Lush, L. J., said on this point:

" 'Practice in the larger sense . . . like procedure . . . denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right and which, by means of the proceeding, the court is to administer, the machinery, as distinguished from its product.' "

"The county court rules were compared with the provisions of the English rules under the Judicature Act on the same subject and it was declared that taken as a whole it was clear that the challenged provision was procedural.

" 'The language of the section which I read . . . is not exact—the right of a defendant to appeal to the Court of Appeals from an order committing him to jail for contempt of court in disobeying an injunction was challenged on the ground that an appeal to that court was limited to matters of practice and procedure, other classes of appeals going to the divisional court.

"The language of Lord Justice Lush in *Poyser v. Minors*, *supra*, was quoted with approval, and Slessor, L. J., said, (p. 93) :

" 'The language of the section which I read . . . is not exactly the same as that of the order we have here to consider, but I think the definition of practice which is there stated is one which properly can be applied here; and I ask myself, therefore, within the meaning of these observations of Lush, L. J., whether this order for committal is not a mode of proceeding by which a legal right is enforced. It appears to me clearly that it is so.' "

Such are the principal definitions found and, frankly, they do not seem to be very helpful, whether as definitions, as formulas, or in arriving at any determination as to whether any statute or law is substantive or procedural for rule-making purposes. After all, it would seem clear that no all-embracing formula can be devised to guide the court in rule-making. Each rule and each proposed change will have to be studied separately and stand on its own merits, treated in the light of certain principles and policies.

A few illustrations from our own code may be referred to as indicating the vagueness of any definition that might be formulated or the uselessness of trying to formulate any definition or establish any rule of thumb that can fit every case. The code provides for

certain procedure before the circuit courts in the instances of closing down a mine<sup>56</sup> or passing on assessments fixed by the assessor<sup>57</sup> but no appeal is provided to the supreme court. Unquestionably there is procedure involved here. An appeal is procedural but in this procedure there is a certain right or lack of right representing a policy established by the legislature. The failure of the legislature to give that privilege is a right within procedural matters.<sup>58</sup> The statute giving us the right of appeal does not infringe on due process of law, nor can the court by rule authorize an appeal where the legislature has denied the right of appeal.

Another instance is the following: The plaintiff recovers a judgment, which the statute makes a lien on the real estate of the defendant, but provides that, before enforcing such a right, the plaintiff must have an execution issued and returned *nulla bona* after which the plaintiff may then proceed in equity to enforce the lien against the real estate.<sup>59</sup> After the judgment has been obtained, all the other steps are procedural; but it is not likely the supreme court would undertake to state a rule making unnecessary the use of an execution before proceeding to sell the real estate. Again there is a right or policy involved within the method of procedure. Or take the case of an attachment. Here the plaintiff has a substantive right at law to enforce his claim against the defendant. After that, it would seem that everything else involved is the method of procedure to enforce such a claim but, in doing so, there would seem to be involved some rights of a substantive nature. Evidence is procedural but many rights become involved in all phases of evidence wherever the legislature has expressed a policy or declared itself on the competency of certain evidence. The taking of depositions is procedural but there are certain rights in regard to the taking of depositions which have been established by the legislature. The method may be procedural but these certain rights probably should not be changed by the court.

At one time, the United States Supreme Court in the *Botsford* case,<sup>60</sup> held that an order of court to examine the plaintiff, physically or mentally, relative to an injury in controversy, unduly inter-

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<sup>56</sup> W. VA. CODE (Michie, 1943) § 2397.

<sup>57</sup> *Id.* at § 694.

<sup>58</sup> *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116 (1903); *of. Ex parte McCardle*, 7 Wall. 506 (U. S. 1869).

<sup>59</sup> W. VA. CODE (Michie, 1943) § 3769.

<sup>60</sup> *Union Pacific Ry. v. Botsford*, 141 U. S. 250 (1891).

ferred with private rights and was improper. Nevertheless the Court later promulgated Rule 35 authorizing just such an order.<sup>61</sup> The order, it would seem, is not enforced by holding the party in contempt of court for failure to obey; but other penalties are provided in the way of not permitting the party ordered to undergo examination to introduce evidence as to the injuries until the order is complied with. This rule was affirmed upon consideration in *Sibbach v. Wilson*,<sup>62</sup> by a divided court. The dissent conceded legislative power to change the rule but declined to attribute such result to Congress' failure to disapprove the rules when submitted.<sup>63</sup> The whole chapter on evidence in our code<sup>64</sup> generally involves procedure but by close study it will be found that substantive rights are likewise involved in nearly all those statutes. The same applies even to the chapter on pleading, practice and procedure,<sup>65</sup> except to those incidents of procedure having to do with the commencement of a suit. and, as we noted above, there is even some question about that. But, in an examination of the Federal Rules on Civil Procedure and in the examination of various codes of rules on procedure, except as noted below, one is impressed by the degree to which the courts in making rules have stuck to the little details of rules of decorum, internal management of the court, commencement of the action, issuing of process and service of the same, the forms of pleadings, the pleadings themselves, motions, making of parties and new parties to actions, interpleaders, method of introducing evidence, conduct of the trial, and various other matters, all rather simple and routine, for the purpose of creating uniformity and streamlining trials without in any way affecting anybody's rights. But the Supreme Court of the United States, the Maryland Court of Appeals, the Texas Supreme Court, and others with real rule-making power which is exercised on a large scale got the acquiescence of their legislative bodies in their rules after they were drafted.<sup>66</sup> It is interesting on the other hand to note Pennsylvania making sweeping changes by

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<sup>61</sup> Extensive reference to state statutes or rules authorizing such examination and to state decisions approving their constitutionality was set forth in the annotation of the advisory committee which accompanies the Rule.

<sup>62</sup> 312 U. S. 1 (1941) (5-4 decision).

<sup>63</sup> *Id.* at 18.

<sup>64</sup> W. VA. CODE (Michie, 1943) c. 57.

<sup>65</sup> *Id.* at c. 56.

<sup>66</sup> See 1 MD. CODE ANN. (Flack, 1939) art. 26, § 35; TEX. STAT. (Vernon, Supp. 1939) art. 1731a, § 2.

rules which are not to be submitted to the legislature.<sup>67</sup> Some of the fields covered are venue, forms of action, such as assumpsit, trespass, ejectment, quieting title, replevin and quo warranto. Attachment actions will be consolidated. The subjects of rules drafted by the committee in charge to be submitted to the court included construction, conduct of the business of the courts, appeals from administrative agencies of the state and parties to actions, as follows: real parties in interest, corporations as parties, partnerships as parties, associations as parties, the commonwealth and political subdivisions as parties, minors as parties, incompetents as parties, actions for wrongful death, joinder of additional parties, nonresident defendants, interpleader, and intervention. Rules on depositions, discovery, eminent domain, and assessment of damages are also in the offing. The Pennsylvania statute in breadth of authority would seem to be about in a class with that in West Virginia. Those rules already made and those in the making will not be submitted to the legislature, according to information from a member of the Procedural Rules Committee.

It makes no difference that the legislature has failed to exclude substantive law specifically from the rule-making power passed on to our supreme court. If there were no constitutional prohibition against it, there is no reason why the legislature might not delegate authority for making rules involving substantive as well as procedural law; but the courts have not encouraged this generally speaking—in fact, they have been very reluctant to use the powers authorized by statute in various states. In this state, the legislative, executive and judicial powers are clearly separated by the constitution<sup>68</sup> and our supreme court has always given great weight to this provision of the constitution,<sup>69</sup> hence, any rule of court made touching substantive law in any degree would be invalid as legislating. It would seem clear, then, that our court is limited in scope to matters purely of pleading, practice, and procedure; and to be consistent, it probably should not make rules involving “twilight zone” questions. In Colorado, in 1913, full rule-making powers had been given the court; in 1929, it made a rule relative to commenting on the evidence. The legislature revoked the rule. The court ceased making rules

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<sup>67</sup> Cf. Kenworthy and Anderson, *The New Procedural Rules* (1946) 18 PA. B. A. Q. 59.

<sup>68</sup> *Supra* note 21.

<sup>69</sup> The recent case of *Sims v. Fisher*, 125 W. Va. 512, 25 S. E. (2d) 216 (1943), relies heavily on this constitutional provision and contains a collection of other West Virginia decisions of like nature.



then until 1941 when rules substantially paralleling the Federal Rules of Civil Procedure were adopted in Colorado.<sup>70</sup>

Many are the questions that might be posed to intrigue one's sense of reasoning, *viz.*:

Under some statutes of frauds, one state, as a penalty for non-compliance, calls for voiding the alleged contract; another, for non-enforcement of it. Substantive law is involved in the one case and procedural law in the other case. Now, in a state having the non-enforcement statute, "unless in writing", *etc.*, could the court make a rule and add "or unless proven by at least two disinterested witnesses?"

Take this example: A tort-feasor, by statute, cannot testify to what decedent said at the time or before the accident resulting in death. After the occurrence, the law is changed and he can. This merely affects the remedy in a proceeding in which there is no vested right but, in rule-making, this matter would seem to be substantive, involving fairness and legal tradition. The same situation occurs in matters involving the statute of frauds. If substantive law is not involved, there would seem to be at least a "substantial or substantive principle" involved in rule-making, *viz.*, "changing the rules in the middle of the game."

Here is a case: In one state, one witness is sufficient to establish a certain fact. In another state, it takes two witnesses. The forum governs because procedure is involved but suppose the first state changes the *statute* to require two witnesses after the alleged fact had occurred. The statute would govern because no vested right is involved. But suppose the court makes the change by rule of evidence. Would the bar or the public or the legislature, at this time, stand for changing this rule in the middle of the game?

In one state a spouse may be a witness against the other, in another not. Here in the forum, procedure is involved but it is substantive law or at least the case is in the "twilight zone" in the *lex loci*, in the event a court in the state in which the subject matter of the suit occurred, changes the rule after the cause of action arose. Most statutes involving evidence, presumptions, and the like, although generally referred to as procedural, as a mere matter of classification, seem in fact to be in the "twilight zone" and in a great many instances are substantive law.

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<sup>70</sup> The Colorado experience is summarized in Harris, *supra* note 27, at 7.

Chamberlayne went so far as to say there is no difference between substantive and procedural law and added: "The remedy and the pre-determined machinery so far as the litigant has a recognized claim to use it are, legally speaking, part of the right itself."<sup>71</sup> Some writers question whether a distinction can be drawn between things clearly regarded as "substantive law" and things which are regarded as "important and substantial". Attorneys relied on the latter in *Sibbach v. Wilson*. It is of particular interest at this time to observe the difficulty the United Nations have had at their conferences, over the distinction between substantive and procedural matters. It will be remembered that originally it was decided the veto power would only apply to substantive and not to procedural matters;<sup>72</sup> but the Russians began vetoing procedural as well as substantive matters — apparently on the theory that procedural matters of substantial importance to the U.S.S.R. became substantive.

It has been thought by some that these distinctions are only a difference of degree.<sup>73</sup> A rule or statute affecting the existence of an accepted remedy or rule of procedure or even abbreviating or enlarging it is a rule of substance.

A very good, brief conclusion has been put by one writer thus: "Procedural law can be only vaguely defined; it is adjective law. It is auxiliary to the substantive law and provides the method of enforcing substantive rights; a given rule may be treated as dealing with a substantive right in one case and with procedure in another; because of the difference between the ultimate questions in the two cases. The answer to the question, 'What is procedural?' depends upon the answer to another question, 'Why do you want to know?'"<sup>74</sup> This authority further concludes that the litigant should have no right in precepts which are designed to provide for the orderly dispatch of judiciary business, the saving of public time, and the maintenance of the dignity of tribunals. These are proper subjects for rules of court. The other class of precepts, designed to assure to each litigant full and fair opportunity of presenting his case and

<sup>71</sup> 1 CHAMBERLAYNE, *loc. cit. supra* note 8.

<sup>72</sup> This is expressed in the difference between U. N. CHARTER, Art. 27, § 2, and *id.* § 3, incorporating the results of the so-called "Yalta formula". The matter is fully discussed in Kelsen, *Organization and Procedure of the Security Council of the United Nations* (1946) 59 HARV. L. REV. 1087, especially at 1100-1108.

<sup>73</sup> Cf. HOLMES, COLLECTED LEGAL PAPERS (1920) 232; LEWIS, THE ANATOMY OF SCIENCE (1926) 173.

<sup>74</sup> Green, *To What Extent May Courts under the Rule-Making Power Prescribe Rules of Evidence?* (1920) 26 A. B. A. J. 482, 483.

making the case against him, constitutes a more complicated problem. To what extent a canon of this second class is a matter of individual right and to what extent merely of judicial convenience or of detail depends upon public policy and the content of the concept of justice. "Almost any rule of evidence can be made to appear to involve substantive elements, if an exaggerated view of the importance of method is accepted."<sup>75</sup> An example is Rule 35 of the Federal Rules upon plaintiff's theory in *Sibbach v. Wilson* that the procedure changed by the rule was "substantially important".

### *Summary and Conclusions*

It seems the whole thing sums up to this: There is no need for any wholesale changing of rules or adoption of a code of rules in West Virginia at this time. There is no demand for it. Our present system is too satisfactory. There are a few changes that may be needed. Some of them will, no doubt, be effected without the aid of legislative action. In making rules, the court will undoubtedly consider every proposed change from a constitutional and fundamental standpoint, whether it promotes justice, whether it is in accord with legislative policy in the state, whether it will promote uniformity of procedure or cause any radical change in the result to litigants, and if any serious question should arise in regard to any change or in regard to the abolition of any statute or in the making of any completely new rules, the court in case of doubt will consult the legislature. This is the recommended procedure which has been resorted to by the Federal Government and by several of the states.

There has been so much written on the subject of this paper and there is such a contrariety of opinion that it has not been its purpose to convince or persuade, except as to one thing, which is, that no clear definition can be given for substantive or procedural law to fit all cases nor can any formula be provided as a guide in rule-making. Each proposed rule must be studied separately with the concepts above enumerated in mind.

1. No satisfactory, workable formula to be used as a yardstick in making rules by the court is possible. Many formulas might be given but each one would be phrased according to the individual

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<sup>75</sup> *Id.* at 489.

point of view While the writer knows that it is not a satisfactory one, he has experimented with the following:

Procedure for rule-making is the method by which a right is defended or maintained in court without affecting the right itself. Any procedure which in any degree infringes upon, changes, or affects the right itself, either vested, inchoate, or conditional, and which makes it easier for the plaintiff to maintain his case or more difficult for the defendant to defend his side of the case, involves substantive law.

2. There is no immediate need for a complete code of rules in West Virginia.

3. Each suggested rule change should be considered on its own merits as to whether it promotes justice and expedites the court's work. If so, it should be made. If there is substantial doubt as to whether only procedural law is involved, it should be submitted to the legislature as a matter of expediency.

4. An amendment should probably be made to rule-making sections of the West Virginia Code<sup>76</sup> providing that from time to time, in its discretion, the court may submit proposed rules to the legislature at least ten days before any session, and if no action is taken before adjournment of the legislature, the rules as drafted by the court will become effective on the day of adjournment.

5. There are and will be many instances where new rules will be found desirable by the bench and bar, especially in cases where the legislature has failed to act, *e. g.*, in not having provided any procedure in an action or suit for declaratory judgment.

6. It is obvious that rule-making by the court when needed is more desirable than by legislative enactment.

7. The bar generally and as a whole will not be interested in whether some rules intrude on the substantive law but whether the rules promote justice and facilitate the work of the judge and the lawyers.

8. Sight should not be lost of the fact that the substantive common law, as well as procedural common law, is judge-made (if not created, at least moulded) and a great majority of the bar and the public prefer this method to legislative enactment. Certainly if the court has the right to change the rule by decision, it should have the right to make the rule in the first place.

9. Primarily, legislative enactment was used when the judges went wrong or new conditions made a change desirable and the

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<sup>76</sup> *Supra* notes 13, 14.

judges were too stubborn or indolent to correct the situation or succeeding judges, through courtesy to their predecessors, failed to do so.

10. Theoretically it is only where a new and different policy regarding the subject matter of rules of court is desirable that legislative enactment should be required and theoretically, when the legislature goes beyond that, it is in the field of the judiciary.

11. It must not be overlooked that substantive law for rule-making purposes depends on the degree of importance the particular individual attaches to the subject matter under consideration. Substantive law may, therefore, be regarded as a relative concept, relative as to importance to the individual and also relative as to importance for the purpose for which the law or rule is brought into use. It may be that under this concept of what is substantive law, the term itself is a misnomer. At any rate, the term is an enigma, evasive and elusive.

"One by one we have seen how categories which at first seem sharply defined merge one into another, and how every classification when analyzed shows that some imaginary line has been arbitrarily taken as a boundary."<sup>77</sup>

12. Legislative enactment supplies to the common law the current philosophy of the day which tradition has not yet accepted as a part of the common law.

13. As pointed out by Judge Paul in an address at the University of Washington in 1939:

"If the rule-making power is not fully exercised, there may come a time when it will be contended, with at least the shadow of legal support, that the power has been surrendered, or, if not, that the failure to exercise the power will encourage legislators to tinker with procedure as they did before the passage of the rule-making act."<sup>78</sup>

14. Lastly, our West Virginia legislature has given broad authority but none too broad. Courts probably had it already. They should use it liberally to promote justice and expedite the work of the courts but with discretion and expediency so as not to antagonize the legislature, the bar, or the public. The law, after all, is a philosophy as well as a yardstick.

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<sup>77</sup> LEWIS, *THE ANATOMY OF SCIENCE* 178.

<sup>78</sup> Paul, *supra* note 19.

## APPENDIX

The following list of materials is appended for the convenience of those who may wish to pursue the subject further. While the list is not exhaustive, the works cited and those cited therein give a substantially complete coverage.

2 AUSTIN, *LECTURES ON JURISPRUDENCE*, *Lecture XXXV* (4th ed. 1879)

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1 CHAMBERLAYNE, *MODERN LAW OF EVIDENCE* (1911) § 171.

GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) c. 5.

HOLLAND, *JURISPRUDENCE* (11th ed. 1910) c. 7.

SALMOND, *JURISPRUDENCE* (7th ed. 1924) 172.

TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) c. 16.

Atwood, *Promoting the Welfare of the Bar by Court Rule* (1936) 15 NEB L. BULL. 69.

Cook, "SUBSTANCE" AND "PROCEDURE" in the *Conflict of Laws* (1933) 42 YALE L. J. 333.

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Gertner, *The Inherent Power of the Courts to Make Rules* (1936) 10 U. OF CIN. L. REV. 32.

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Kocourek, *Substance and Procedure* (1941) 10 FORDHAM L. REV. 157.

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Paul, *The Rule-Making Power of Courts* (1926) 1 WASH. L. REV. 163.

Pound, *Rule-Making Power of Courts* (1936) 21 MASS. L. Q. 70.

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Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures* (1936) 22 A. B. A. J. 772.

Wheaton, *Courts and the Rule-Making Powers* (1936) 1 MO. L. REV. 261.

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*Rule Making Power* (1937) 35 MICH. L. REV. 1930.

*Practice and Procedure — Courts — The Rule Making Power* (1936) 14 NEB. L. BULL. 289.

I am indebted to Judge Charles H. Paul of Seattle, Washington, for the following references to materials on the rule-making power of the courts prepared by the University of Washington Law Library, which he has generously made available to me:

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tributions by Cushing, Cutting, Grinnel, Hinton, Marvel, Pound, Shelton, and Sunderland).

Houck, *Judicial Power and the Duty to Eliminate Unlawful Practice of the Law* (1935) 21 A. B. A. J. 717.

Marvel, *The Rule-Making Power of the Courts* (1928) 12 J. AM. JUD. Soc. 55.

Marvel, *The Rule-Making Power of the Courts* (1929) 9 B. U. L. REV. 91.

Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599.

Shelton, *Progress of the Proposal to Substitute Rules of Court for Common Law Practice* (1927) 12 VA. L. REG. (N. S.) 513.

Sunderland, *The Need of a Rule-Making Power* (1937) 10 J. AM. JUD. Soc. 148.

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Earlier bibliographies in the field, to which reference is hereby made, are to be found at (1930) 16 A. B. A. J. 199, and (1926) 6 ORE. L. REV. 36.